THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge for 14th Circuit

Case No.: 2012-CP-07-03027

Sheetal, LLC of Beaufort . . . . . Appellant,

-vs.-

Beaufort Jasper Water and Sewer Authority . . . . . Respondent.

RESPONDENT'S INITIAL BRIEF

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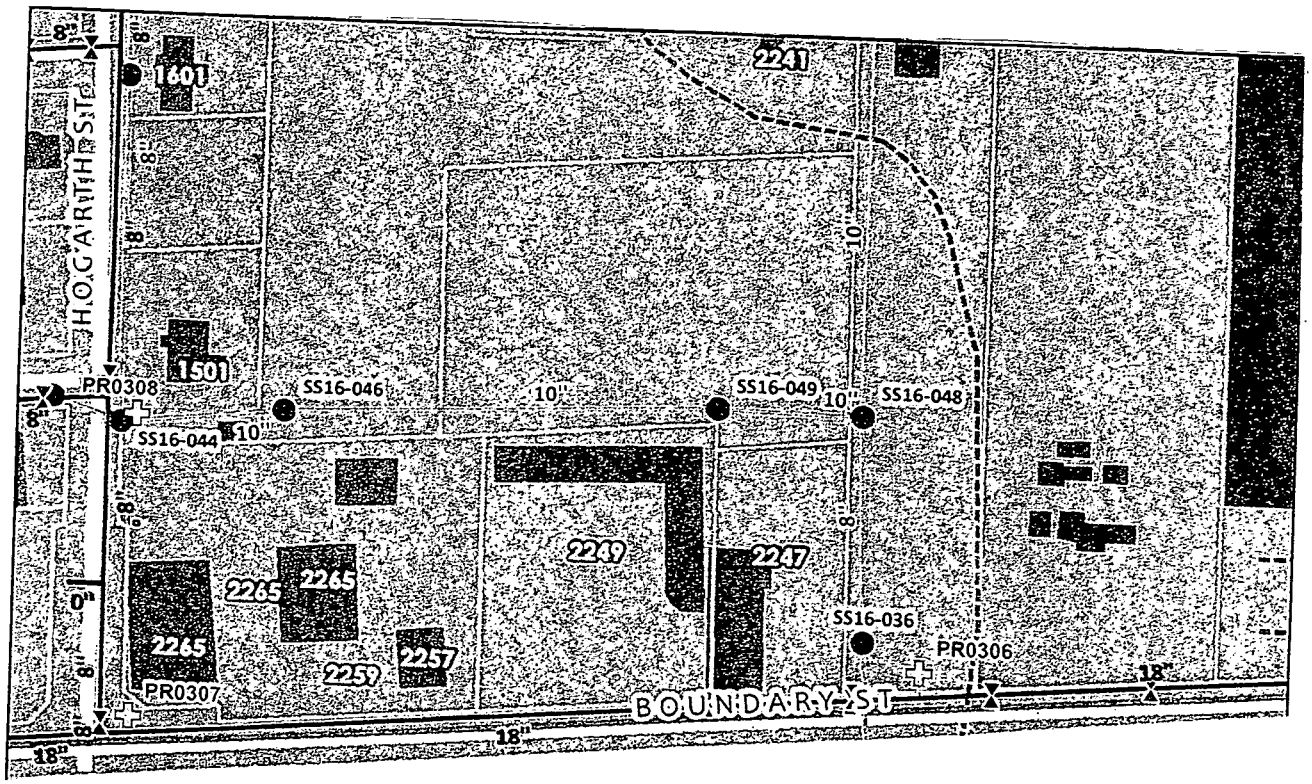
STATEMENT OF THE CASE

Respondent Beaufort Jasper Water and Sewer Authority agrees with the various recitations (Appellant's Initial Brief pp.1) contained in Appellant's Statement of the Case. However, Respondent creates a new category called "FACTS" (Appellant's Initial Brief pp.2) and Respondent would assert that the Court made its Findings of Fact in the Order that it issued on September 11, 2013 and filed on September 13, 2013 (Summary Judgment Order dated September 11, 2013). Insofar as Appellant creates a new category called "Facts", Respondent asserts that the Court's Finding of Facts control what is or is not a fact.

For purposes of illustration, Respondent has reproduced a system map (ROA—BJWSA System Map) showing the route and location of the ten (10") inch sewer line as it passes through the 1.4 acre parcel (also known as R120-026-000-0172).

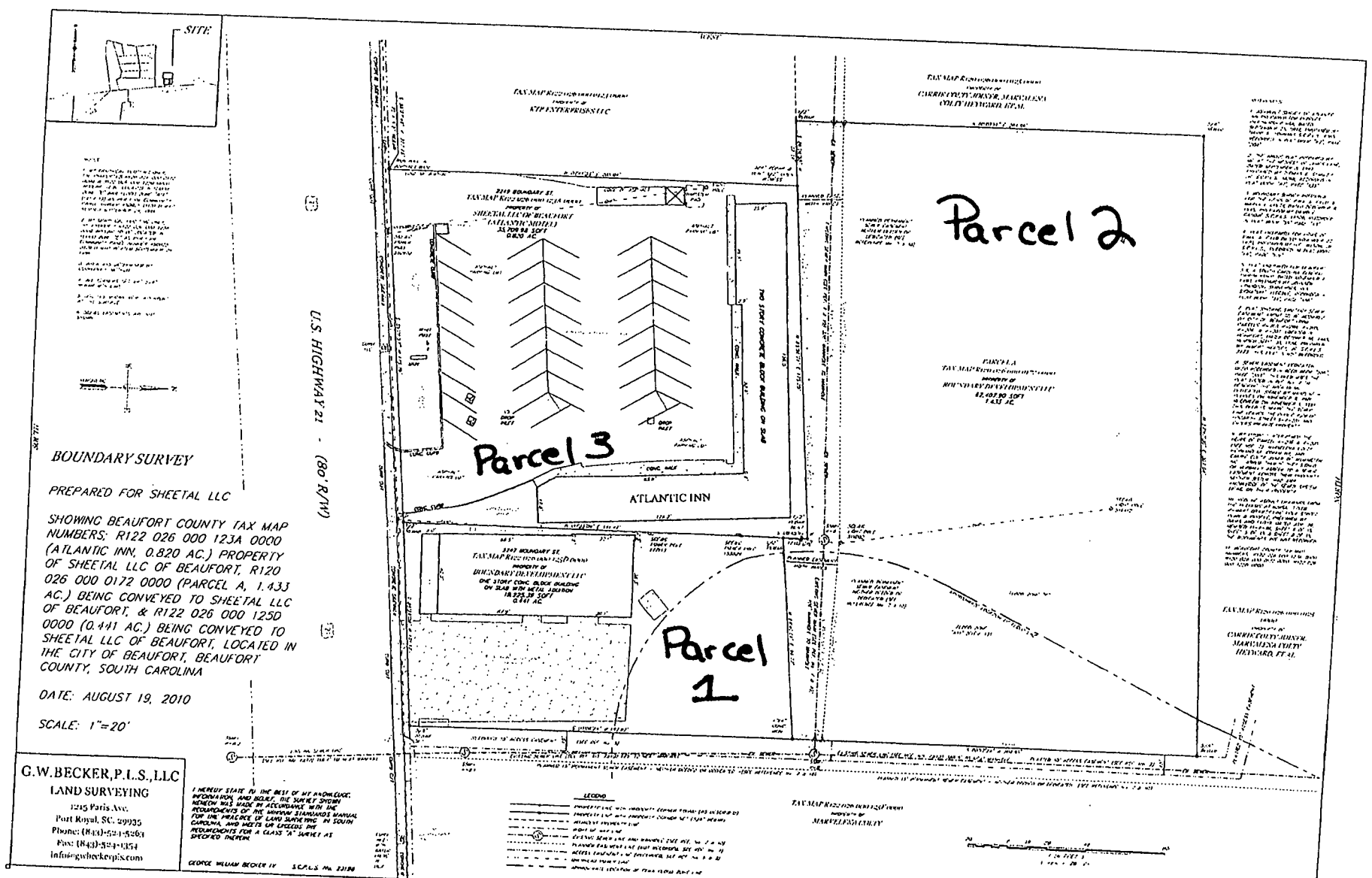


The Court found, as its 1st and 2nd Findings of Fact, that the City of Beaufort installed this sewerage pipeline in 1986 and the City, the person of Frank Emminger, had a discussion with the owners of the 1.4 acres (R120-026-000-0172). Based upon this discussion, the City moved the path of the pipeline five (5') feet north of its original intended path across the lower part of the 1.4 acres.(Order dated September 11, 2013)

The Court found in its 3rd Finding of Fact, that notwithstanding this discussion with the owners, the City of Beaufort failed to condemn the property. (Order dated September 11, 2013).

The Court found, as its 4th Finding of Fact, that the City of Beaufort sold its entire system, including this particular sewerage pipe, to Defendant Beaufort Jasper Water and Sewer Authority in 1999; and that Defendant BJWSA (5th Finding of Fact) used and operated this particular pipe from 1999 until the present time. (Order dated September 11, 2013)

The Court found as its 7th and 8th Findings of Fact, that a plat was prepared for Appellant on August 19, 2010; then, in spite of this plat dated August 19, 2010, 'which appears to show the location of the pipeline across the 1.4 acres', The Court found that the Appellant bought the 1.4 acres on August 25, 2010. (Order dated September 11, 2013). The August 19, 2010 plat is reproduced on the following page.


SITE
Parcel 2
Parcel 3
Parcel 1
ATLANTIC INN
U.S. HIGHWAY 21 - (80' R/W)
BOUNDARY SURVEY
PREPARED FOR SHEETAL LLC
SHOWING BEAUFORT COUNTY TAX MAP NUMBERS: R122 026 000 123A 0000 (ATLANTIC INN, 0.820 AC.) PROPERTY OF SHEETAL LLC OF BEAUFORT, R120 026 000 0172 0000 (PARCEL A, 1.433 AC.) BEING CONVEYED TO SHEETAL LLC OF BEAUFORT, & R122 026 000 125D 0000 (0.441 AC.) BEING CONVEYED TO SHEETAL LLC OF BEAUFORT, LOCATED IN THE CITY OF BEAUFORT, BEAUFORT COUNTY, SOUTH CAROLINA
DATE: AUGUST 19, 2010
SCALE: 1"=20'
G.W.BECKER,P.L.S.,LLC
LAND SURVEYING
1215 Paris Ave.
Port Royal, SC. 29935
Phone: (843)-524-5263
Fax: (843)-524-0354
Info@gwbeckerpls.com
LEGEND

The Court found that the affidavits of Joseph Devito and Dean Moss established that the City of Beaufort and BJWSA operated and maintained the sewerage pipeline for a period of twenty-six (26) years, (Order dated September 11, 2013).

Appellant, in his rendition of the "Facts" (pp.2 of Appellant's Initial Brief) talks about a search with a metal detector indicating the path of the sewer line was across 1.4 acres; the making of Appellant's plat (prior to purchase) confirming that the path of the pipeline across the 1.4 acres; a preconstruction conference after the purchase in which there was alleged discussion about the pathway of the pipe; and discussions between the Appellant and Respondent (after his purchase) alleging that the Respondent Beaufort Jasper was confused or mistaken about the path of the pipeline. There is, finally, in his category called "Facts", Appellant's assertion of trespass and Respondent's response that it had acquired a prescriptive easement.

Respondent believes that the facts of this case are embracing in the Findings of Fact as set out in the Court's Order of September 11, 2013. Respondent believes that Statement of the Case is correct and accurate. However, the "Facts" as presented on pages 2, 3 and 4 of Appellant's Initial Brief are Appellant's additions to the findings and are contested issues. While certain of these "Facts" are supported by Appellant's affidavit, they are contested by Respondent's affidavit. Ultimately they were not adopted by the Court.

Respondent asserts that if there is to be a separate category called "Facts"; it must be limited to the "Findings of Fact" as the facts are set out in the Court's Order of September 11, 2013. It is clear that Appellant would like his allegations (dealing with the plat and his discussions with Respondent) to be considered true. However, the Court did

not accept these allegations as true. Consequently, Respondent would reiterate that the "Facts" are set out in those nine (9) items on pages 1 and 2 of the Court's Order dated September 11, 2013.

STANDARD OF REVIEW

"Summary judgment is completely appropriate when a properly supported motion sets forth the facts that remain undisputed or are contested in a deficient manner." M&M Group Inc. v. Holmes, 379 S.C. 468, 666 S. E. 2d 262 (S.C. App. 2008). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. The nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Singleton v. Sherer, 377 S.C. 185, 659 S.E. 2d 196 (2008).

ISSUE 1. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO BJWSA AS TO SHEETAL, LLC OF BEAUFORT'S TRESPASS CAUSE OF ACTION.

"Sheetal, LLC of Beaufort alleges trespass on the part of BJWSA across Parcel 3" is the first sentence of Appellant's first argument beginning on page 5 of Appellant's Initial Brief. (Based upon the previous statement (See Appellant's Initial Brief pp.2) that Parcel 3 is the parcel on which the Atlantic Motel is located, Respondent believes that the ten (10") inch pipeline in question does not touch or invade the Atlantic Motel property—characterized as Parcel 3. It is therefore believed that the Appellant intended to say that Parcel 2—which is the vacant 1.4 acres just above the Motel--is the allegedly violated parcel rather than Parcel 3).

There is little question that the City of Beaufort came into the peaceable possession of the pipeline. Appellant confirms that the owners of the 1.4 acre parcel actually talked to the City of Beaufort and they persuaded the City to locate the sewerage pipeline about five (5') feet North of the original, intended path (Finding of Fact # 2 of the Court's Order dated September 11, 2013).

It is without argument that the original 1986 entry was peaceable and remained peaceable for another twenty-six (26) years (Finding of Fact #6; of the Order dated September 11, 2013). In an early South Carolina case it was held that one peaceable possession, through lacking title, is entitled to remain in possession until ousted by the true owner. Watson v. Motley, 121 S.C. 482, 114 S.E. 412 (1922). The remedy in this particular instance is not an action in trespass, rather it is an action to remove or 'oust' the peaceable possessor by the 'the true owner'. This is the remedy set out in the case of Little v. Little, et.al., 75 S.E. 2d 871,

In Little, the Plaintiff alleged that he was the owner of and in lawful possession of the premises—and the Defendant had trespassed. Defendant denied Plaintiff's possession and his title. In this instance, the Court said an action of 'trespass guare clausum fregit' became 'trespass to try title' and an action to determine not only the issue of trespass, but also of title.

In the matter before the Court Respondent BJWSA alleged ownership by virtue of prescription; thus transforming the issue from trespass guare clausum fregit to 'trespass to try title' In our case the Court must address the Respondent's argument that it acquired title by virtue of its peaceable entry and peaceable use (of the pipeline) for twenty-six (26) years. This then takes us to Appellant's assertion that Respondent BJWSA cannot satisfy the elements of prescription.

ISSUE 1a. BEAUFORT JASPER WATER AND SEWER AUTHORITY IS UNABLE TO SATISFY THE ELEMENTS FOR A FINDING OF A PRESCRIPTIVE EASEMENT.

In responding to this allegation it is important to remember that the Court found the Respondent Beaufort Jasper Water and Sewer Authority was in 'peaceable possession of the pipeline' (Conclusion of Law #14 in the Order dated September 11, 2013). In fact, the Court found Respondent and the City of Beaufort had been in 'peaceable possession' for more than twenty-six (26) years. (Finding of Fact #6 of the Order dated September 11, 2013).

All of which brings us to the changing nature of prescription as that concept is defined in South Carolina. It brings us, in particular to Horry County v. Laychur, 315 SC 364, 367, 434 S.E. 2d 259 (1993); and to Loftis v. South Carolina Electric and Gas 361 S.C. 434, 604 S.E. 2d 714, (2004).

In Horry v. Laychur the Court said three items are necessary for prescription. (1) There must be continued and uninterrupted use or enjoyment of the right for 20 years. (2) The identity of the thing enjoyed must be proven. (3) Finally, the use must be adverse *or under a claim of right.*

In the Horry case, International Paper argued that there was no adversity, and therefore no prescription. However, it was established that International Paper had given the public (in Horry County) permission to use its land. And that the public had used it for the requisite 20 years. And therefore Horry County might have acquired a "claim of right" in terms of its usage of the International Paper property. Loftis v. South Carolina Electric and Gas came along in 2004 confirming the new requirements as to prescription in South Carolina. Loftis confirmed the items required--(1) Twenty years of uninterrupted

use; (2) indentify of the living enjoyed; (3) and that the possession must either be adverse or under *claim of right.* Loftis went on to say that, "the brunt of Appellant's argument, however, lies in the 3rd requirement for establishing by prescription. Appellant incorrectly asserts that the prescriptive easement cannot be established because 'obviously, use is not adverse where the defendant had a mistaken belief it had a right to be on the property. Appellants ignore that a prescriptive easement can also be established under a 'claim of right' or, in other words, under the very mistaken belief Appellants admit drove SCE&G's actions."

ISSUE i. THE ORIGINAL PLACEMENT OF THE SEWER LINE WAS NOT ADVERSE AS IT WAS INSTALLED AND USED WITH THE ORIGINAL PROPERTY OWNER'S PERMISSION.

Appellant says that installation of the pipe was done so with the "permission of the landowner" and permissive use 'cannot ripen" into prescription. He cites Williamson v. Abbott, 107 S.C. 397, 400-01, 93 S.E. 15, 16 (1917) and Paine Gayle Properties, LLC v. CSX Transp., Inc, 400 S.C. 568, 584, 735 S.E. 2d 528 (Ct. App 2012) for this proposition.

We don't know the details of the 'permission' that was given by the owners in 1986, Frank Emminger's affidavit only says there were discussions and then the relocation of the pipeline northward from the motel. However, Respondent would reiterate that in South Carolina prescription may be founded on conduct that is adverse or under a claim of right. In the case of Horry County v. Laychur, 315 S.C. 364, 367, 434 S.E. 2d 259, 261 (1993) we know that use, by the public, was with the permission of International Paper. In Horry permission from International Paper was not fatal to the issue of prescription. And it is not fatal here.

ISSUE ii BJWSA WAS UNABLE TO EVEN IDENTIFY THE LOCATION OF THE SEWER LINE UNTIL IT WAS DISCOVERED AND POINTED OUT BY SHEETAL LLC OF BEAUFORT.

When the pipeline was installed, in 1986, all parties knew it was located on the 1.4 acres. As previously noted there was a request, by the then owners, to move the line five (5) feet to the North of where the City of Beaufort intended to bury the pipe. There is no question that both the City of Beaufort and the owners of the 1.4 acres knew the location of the sewerage pipeline.

This particular pipe collects sewerage from The Atlantic Motel (and other properties in the neighborhood) by way of multiple underground PVC lines. These PVC lines are revealed by clean-out valves that are visible along the back side of the motel itself. There is also a manhole. This manhole allows access into the pipe for repairs and for period maintenance. This manhole is also visible and is also shown on the plat prepared for Appellant prior to purchase.(See George Becker plat dated 8/19/10)

During its years of ownership and possession both the City and Respondent Beaufort Jasper utilized the manhole to access the pipe and to make periodic repairs.

"I was involved with maintenance of the pipeline, in particular the cleaning of the line" said Joseph Devito, an employee who worked for both the City of Beaufort and for Respondent Beaufort Jasper. (See Item #2 of Joseph Devito's Affidavit).

Respondent Beaufort Jasper knew where the manhole was located—and where its collection pipe was located--because Joe Devito was involved with the cleaning-out of this line.

In his "Facts" the Appellant says that only Appellant knew where the line was buried; and he knew where it was buried before he bought the 1.4 acres; but Mr. Dick

Deuel told Appellant (after his purchase) it ran under the Atlantic Motel. This particular assertion was denied by Dick Deuel (See the Affidavit of Richard Deuel) and was not given any credence by the Court because engineers do not put sewer lines under buildings where they cannot be maintained or repaired. Contractors do not excavate under existing buildings where there is vacate, unimproved property available. But even if Respondent did not know that the line was buried five feet north of the Atlantic Motel, it would be ludicrous to think that the line had been buried (in1986) under an existing building.

Appellant now says that Respondent's confusion on this score—its apparent inability to identify the precise location means it cannot satisfy the "identity of the thing used" requirement. Appellant says "The requirement on BJWSA is to be able to identity of the thing used." Appellant apparently cites Horry County v. Laychur for the proposition the Respondent cannot be confused about the location of its line..

Horry County v. Laychur says nothing about "the identity of the thing enjoyed". Horry County v. Laychur is entirely focused on permissive use of property owned by International Paper. However, Loftis v South Carolina Electric and Gas, 604 S.E. 2d 714, 361 S.C. 434, (2004) says plenty about confusion on the part of a utility.

In the Loftis case, SCE&G was wrong in its belief about the location of its power lines, Notwithstanding its mistaken notion as to where its lines were actually located, The Court said "the evidence clearly supports the Master's conclusion that SCE&G used the property to supply power to the residents of Bryan Road for the required twenty year period." Likewise, it is also true that the City of Beaufort and Respondent Beaufort Jasper 'used the property' to collect sewerage from the Atlantic Motel and from many other individuals connected to this particular line.

There is no mention, in Loftis, that confusion on the part of SCE&G defeated the "identity of the thing enjoyed" requirement.

Loftis says "A party may earn a prescriptive easement under a claim of right if he demonstrates a substantial belief he had a right to use the property in a manner consistent with the alleged easement." The operative requirement in Loftis is a substantial belief that one has a right to use the property in question—in this case a sewer pipe marked by a manhole.

Beaufort Jasper does not concede it was mistaken about the location of its pipe—Joe Devito was involved in the cleaning of the pipe—but there is no question that it had a substantial belief and that it (and the City of Beaufort) acted on that belief for a period of 26 years.

In this instance the case of Simmons v. Berkeley Electric Cooperative Inc. 404 S,C. 172 (2013) is also helpful.

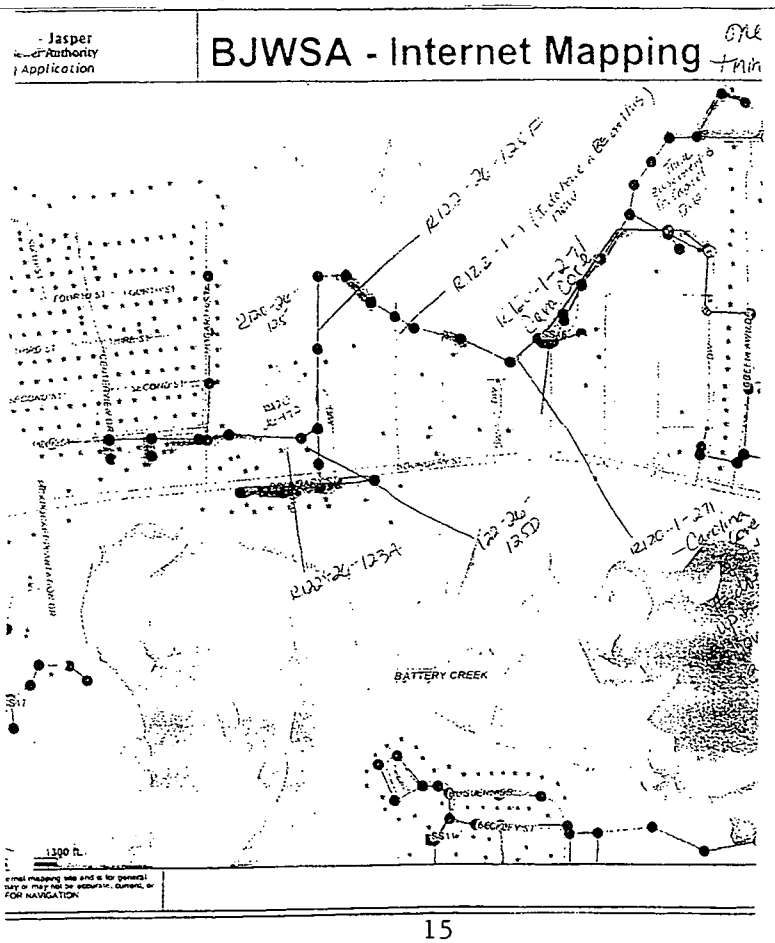
In the Simmons case the St John's Water Company believed it had installed a water main within a particular area covered by an encroachment permit. In this case there was an affidavit from and engineer named Miley who thought that the encroachment permits secured from Charleston County covered the water main. Apparently, the St John's Water Company and its engineer were wrong. The water main was not inside the easement area. Notwithstanding the fact that St John's did not know exactly where its pipe was located, the Court, in Simmons, held "The fact that the claim may have been based on a mistake does not negate the claim of right required to establish a prescriptive easement."

There is nothing in the Simmons case that says anything about "identity of the thing" requirement being missing or violated.

Appellant says (pp.9 Appellant's Initial Brief) that "BJWSA bears the burden of showing that they knowingly utilized the sewer line that runs across Parcel 3". Respondent submits that "knowingly utilized" is no where mentioned in the Loftis case; the Horry County or the Simmons cases. What is required is a 'substantial belief" that it had the right to use the property.

These cases also stand for the proposition that a power or water utility may be mistaken about where its line or pipe is actually located. But if that utility had a substantial belief that it had the right to use the line (or pipe), and did use it for the required twenty years, it had an easement.

At the hearing on September 3, 2013, Appellant gave the Court a plat (BJWSA Internet Mapping) which is reproduced below.



This plat was given to the Court to prove that Respondent did not know where its line was located. "And if you will compare that with the map that was presented, you will see that we have diverging inquiries to where the sewer line was located. In the piece of paper that I have just handed up, it shows the sewer line actually dropping down and coming across" (pp 8, Lines 4-9, Transcript of Record)

However, if one looks closely at this 'plat' one realizes there are no property lines; no buildings outlines; nothing to give one any guidance about whether the line is in the vacant 1.4 acre parcel or under the motel.

"Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegation or denials contained in the pleadings. The nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Singleton v. Sherer, 377 S.C. 185, 659 S.E. 2d 196 (2008).

Other than the affidavit of Appellant, this plat is the one piece of evidence that the Appellant put in front of the Court for the proposition that Respondent BJWSA believed it's pipeline was under the Atlantic Motel. This rendition did not persuade the Court that Respondent was confused about the location of the pipeline; and it cannot support this appeal.

ADDITIONAL SUSTAINING GROUNDS

At the hearing on September 3, 2013, Respondent's Counsel brought the August 19, 2010, plat to the Court's attention.

> MR.GRABER: If it please the Court? Karl indicated that there was a plat attached to this affidavit which indicated where the sewer line actually is, and Your Honor, if the Court looks at that, the Court will see that that plat is dated August of 2010, and it shows the correct location. If Mr. Twenge is suggesting, and I'm not sure he is, but if he is suggesting that Beaufort Jasper led his client astray a month later, it's simply not true, because in August when he purchased the property, he had a plat done that showed the exact location of the sewer line. (Pp. 9 of the Transcript of Record)

The Appellant had a plat prepared by G.W. Becker showing the 1.4 acre parcel. The plat is dated August 19, 2010 and it shows the location of the sewer pipe and the manhole servicing the sewer line. The Appellant purchased the 1.4 acres on August 25, 2010.

The Appellant knew there was a sewer line (and manhole) on the 1.4 acres prior to purchase and bought the property anyway. The Appellant could have avoided any injury (from the trespass he now claims) by not buying the property. Appellant is estopped from claiming trespass because he could have avoided any alleged damages, or alleged hardship, or alleged inability to develop his property by simply not purchasing the property on August 25, 2010.

CONCLUSION

Respondent Beaufort Jasper Water and Sewer Authority has acquired, by virtue of twenty-six (26) years of use, an easement across the 1.4 acres in question.

It has acquired a right to continue using its sewer pipe because it has met the requirements of a prescriptive easement as they have been redefined by Horry County v. Laychur, Loftis v. South Carolina Electric and Gas and Simmons v. Berkeley Electric Cooperative.

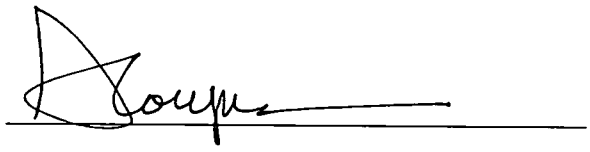
These relatively recent cases have created a 'claim of right' standard that can be used instead of the adversity or hostility requirement. These cases stand for the proposition that a utility can now show a 'substantial belief' that is has the right to use the line (or the pipe). These cases stand for the proposition that a utility can, in fact, be mistaken about where the line is buried. But if it has a 'substantial belief' it can secure, after twenty (20) years, an easement.

Finally, Appellant knew, prior to his purchase, the pipeline ran across the 1.4 acres. Appellant knew this on August 19, 2010 and in spite of his knowledge, bought the 1.4 acres on August 25, 2010.

Appellant claims trespass, but he knew before he bought, that there was an existing pipe running through the acreage he intended to buy.

For all of the reasons outlined herein, the Court's Order of September 11, 2013, should be affirmed.

WHEREFORE, for mutual benefit of the parties, the verdict should be affirmed.



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